No. 11426.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

vs.

MARTIN R. DEVANEY,

Appellee.

APPELLEE'S BRIEF.

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Statement of Pleadings and Facts Disclosing Basis for Jurisdiction of United States District Court and United States Circuit Court of Appeals.

This action was brought under the Federal Employers Liability Act. The District Court had jurisdiction of this case under the provisions of U. S. C. A. Title 45, Sections 51 to 60, it being an action for damages brought by an employee of a common carrier by railroad, engaged in interstate commerce, for injuries alleged to have been sustained while the employee was engaged in interstate commerce business of the employer, as a result of alleged negligence on the part of the employer [R. 2, R. 3, R. 4].

The Circuit Court of Appeals has jurisdiction of this appeal as provided by U. S. C. A. Title 45, Section 225(a), because the decision appealed from was a final one [R. 11], and no direct review thereof may be had in the Supreme Court under the provisions of the U. S. C. A. Title 28, Section 345.

Statement.

This is an action for damages for injuries suffered in an accident at 10:30 P. M. on January 21, 1944 [R. 24, R. 25], at which time plaintiff was employed by defendant as an assistant brakeman on a freight train operating between Yermo, California and San Bernardino, California, at a point commonly known as El Cajon Station [R. 24]. The injuries resulted from defendant's negligence in failing to fasten and secure a heavy ponderous tractor to the floor of the flat car in the freight train. The wires used were frayed, worn, weather beaten, dark and coated so as to make them invisible [R. 203]. As a result of the negligent, improper and careless securing of the heavy army tractor to the flat car, said wires broke and the plaintiff, performing his duties in, about and on said flat car, became entangled in the wires, and due to a sudden movement of the unsecured tractor on the flat car he was thrown from the moving train to the ground [R. 25]. As a result of the negligence on the part of the defendant, and the fall, the plaintiff sustained a hernia [R. 34, R. 36].

At the time of said accident plaintiff was earning and receiving as such assistant brakeman a wage of eight dollars and 24/100 ($8.24 for each one hundred (100) miles. He averaged one hundred and sixty-four (164) miles per day [R. 8, R. 54]. As a further result of this accident the plaintiff lost one hundred seventy-seven (177) days work [R. 8, R. 53]. The plaintiff, therefore, sustained damages in the sum of two thousand three hun-

dred eighty-three dollars and 66/100 ($2,383.66) in the form of loss of earnings [R. 8].

Judge Pierson M. Hall, sitting without a jury, heard this case on May 7, 1946, and found the defendant was guilty of negligence, and said negligence was the proximate cause of the injury, and entered judgment in the sum of two thousand eight hundred eighty-three dollars and 66/100 ($2,883.66), from which judgment the defendant has appealed.

The plaintiff has been a railroad worker since September 27, 1926, and a brakeman for the defendant company since October 26, 1942 [R. 22]. The plaintiff was in perfect physical condition at and prior to the accident. He was given a physical examination by the defendant company before being by the defendant so employed [R. 23]. Plaintiff's duties as such assistant brakeman were to observe the running condition of the train and to follow the instructions of the conductor on the placing and picking up of cars at certain stations [R. 24]. It was the duty of the plaintiff to examine the train from end to end at every stop [R. 24], but there was neither special nor particular duty to especially examine the rear portion of the train, contrary to appellant's assertion. There is no evidence that the train had been inspected by car men at Yermo, California, nor that it was inspected enroute. The defendant's witness, Russell G. Brown, conductor of the train, did not remember whether any inspections had been made at Yermo or at any point on the trip on the day of the accident [R. 186]. The particular terrain

covered on this freight run is very mountainous and enroute to San Bernardino, California, it passes the El Cajon station [R. 24, R. 25]. The plaintiff was riding on the train and just before its arrival at El Cajon station observed "fire flying" [R. 25] from about the second or third car ahead. In order to get to the fire he climbed down from the box car he was on and on to the flat car immediately ahead which contained two army tractors, and walked along the left side of these tractors. The train lurched and at that moment one of the tractors shifted against the plaintiff. His feet became entangled on some broken wires on the floor of the car and as a result thereof he was thrown off the car [R. 25], falling flat on his abdomen on some pieces of wood, lumber and other debris that lay on the ground. The plaintiff suffered an immediate injury to his left abdomen, a cut lip, a broken tooth, and a cut on his knee [R. 27]. Mr. Kenneth Anderson, another brakeman on the same train, saw the plaintiff on the ground on his hands and knees trying to get up and at that time the plaintiff complained of his stomach hurting [R. 138]. Upon arrival home the following morning the plaintiff complained that his stomach hurt [R. 125]. His wife observed his cut lip and his knee and that a tooth was broken off. She further noticed that his left abdomen was swollen and red and she applied medication to it [R. 126]. The plaintiff sought the services of the Union Pacific doctor, Dr. J. L. Nevin, in San Bernardino that same morning but was unable to do so because the doctor was not available [R. 31, R. 127].

The plaintiff sought the services of Dr. J. E. Ballachey, the Union Pacific Railroad Company doctor at Yermo, California, on the day following the accident. Plaintiff's Exhibit Number 3 [R. 45] is a book in which the plaintiff kept a daily record of his hours of work and what occurred on each day. In that record book [R. 169] there is a notation after the date of January 22, which says, "Reported to doctor, Yermo."

The defendant has acknowledged the plaintiff's immediate report of the accident and the injury by a letter, Plaintiff's Exhibit Number 4 [R. 60] from the assistant superintendent of the defendant dated February 13, 1946, in which letter the defendant advised the plaintiff that the accident report submitted by him on January 23, 1944, had been sent to other departments of the company and was not available; Plaintiff's Exhibit Number 4, the defendant's letter, was in reply to Plaintiff's Exhibit Number 5 [R. 170, R. 171], a letter dated February 8, 1946, addressed to the defendant, requesting a copy of the accident report made on January 23, 1944. The record is replete with evidence that the plaintiff did suffer an immediate injury, contrary to the appellant's assertion that the evidence as to the time and nature of the injury is vague.

Referring to the signed statements by plaintiff and other members of the crew concerning the accident, the plaintiff testified that the various reports introduced by the defendant were made in writing by company claim agents who did all the writing and framed the answers in their

own words. He was told to sign these reports and was told that there was nothing for him to worry about, that everything would be taken care of [R. 63], although at the time, the swelling was getting worse [R. 73, R. 74]; further, the plaintiff was afraid the defendant would pull him out of service and this would work to the detriment of the large family that he had to feed [R. 99]. This technique of taking accident reports by the defendant company's claim agents was universal practice [R. 99, R. 100]. Robert Hopkins, head brakeman of the train, said the plaintiff did fall and that he did sustain an injury on the 21st day of January, 1944, and also, that the plaintiff did go see Dr. Ballachey on January 22, 1944 [R. 153].

Russell G. Brown, conductor, the defendant's witness, said that it was possible that the plaintiff had only inspected the right side of the train and that the head brakeman inspected the left side of the train [R. 187]. The accident occurred on the left side of the flat car.

Deductions are made from the employee's wages to provide for any medical attention that said employees might require [R. 54] and are, therefore, not gratuitous of the defendant company.

The army tractors were tied down to the flat car with wires. The plaintiff does not know who loaded these tractors on the flat car or where they were loaded, but the flat car was and had been at all times in the complete control of the defendant when plaintiff's work began

at Yermo, California, to which point the train had been brought by another crew. The defendant introduced no proof concerning the place or manner of loading but did acknowledge that the flat car was in its full possession and control before plaintiff commenced work, therefore, no inference can be drawn that someone else loaded these tractors, but one can be drawn that since the car had been enroute prior to the El Cajon station, the plaintiff had a right to assume that there had been proper prior inspections and that there was no latent defect or danger in the place of his work.

The defendant did not furnish the plaintiff with a safe place within which to work in pursuing his duties. There was an omission on the part of the defendant to use due care such as would be exercised by a reasonably prudent person in the maintenance of said tractors on said flat car. Such heavy tractors could not be safely secured to a flat car with inferior or ordinary wires, particularly over the very mountainous route to be taken by the freight train.

The evidence submitted by the plaintiff established a *prima facie* case of negligence and the doctrine of *res ipsa loquitor* was clearly applicable in this case. This doctrine will be set forth in detail in the argument portion of this brief.

ARGUMENT.

I.

The Evidence Was Sufficient to Support the Findings of Fact.

The plaintiff seeks to recover damages for the injuries sustained upon two (2) theories: First, the defendant is liable in that it did not exercise ordinary reasonable care in affording the plaintiff a safe place to work, and second, that liability exists under the doctrine of *res ipsa loquitor.*

The Federal Employers Liability Act was specifically designed for the protection of employees of a railroad. There is a definite duty and care owed to an employee of a railroad and foremost is the duty of the carrier to furnish an employee with a safe place to work.

> *Perry v. Central Vt. R. R.,* 63 Sup. Ct. 1062 (1942).

This action was brought under the provisions of U. S. C. A. Title 45, Sections 51 to 60. The basis of liability under this chapter is negligence on the part of the carrier. Strict construction of said statute in derogation of the common law, does not require such adherence to the letter as to defeat the obvious legislative purpose. These sections of the statute, pertaining to liability for injuries to employees, should receive a liberal interpretation.

> *Crecelius v. Chicago, Milwaukee & St. Paul R. R. Co.,* 233 S. W. 214.

This action is a remedial one and being brought under remedial legislation, should have a liberal construction to

advance the remedy proposed and to correct the evils against which it was directed. It was designed to enlarge, not to restrict, the rights of the injured workman.

Baltimore R. R. Co. v. Brenson, 98 Atl. 225.

Johnson v. S. P. Co., 25 Sup. Ct. 158.

Sections 51 to 60 of this title should be liberally construed so as to effectuate the intention of Congress.

Rogers v. Ft. Worth R. R. Co., 91 S. W. (2d) 458.

The negligence of a railroad under this chapter may be determined by viewing its conduct as a whole, especially where the elements indicating negligence are closely interwoven and where each imparts character to the others.

Blair v. Balt. & O. R. R. Co., 65 Sup. Ct. 545.

And the negligence of a railroad may be shown by direct or circumstantial evidence.

Bevan v. N. Y. C. & St. L. R. R. Co., 6 N. E. (2d) 982 (1937).

In the case before the court, the negligence of the defendant railroad company has been clearly shown by the evidence. The defendant was negligent in securing a heavy army tractor to a flat car in such a manner that a reasonably prudent man would know that the wires used would be unable to hold said equipment for the length of time required, and over the mountainous territory it had to travel. The defendant had notice that wires used in this manner could break and often did break [R. 156].

> "The common law duty of an employer to use reasonable care in furnishing an employee with a safe place to work becomes more imperative as the risk

increases so that the 'reasonable care' becomes a demand of higher supremacy, but in all cases it is a question of reasonableness of care depending on the danger attending the place or the machinery."

Bailey v. Central Vermont R. R., 63 S. Ct. 1062 (1943).

"The common law employer had the duty of using reasonable care in furnishing his employees with a safe place to work. The common law rules for determining negligence on the part of an employer toward the employee are controlling on the question on what constitutes negligence within the meaning of this chapter."

McGiven v. Northern Pac. R. R. Co. (C. C. A., Minn. 1942), 132 F. (2d) 213.

The appellant argues that there is absolutely no evidence to support a finding that the allegations, paragraphs V and VI of the plaintiff's complaint, are true.

In its answer the defendant admitted ownership of the flat car upon which these army tractors were loaded [R. 5], and that plaintiff was defendant's employee at the time of the accident [R. 5]. The tractors on the flat car were army tractors and the only evidence of the shipping origination of these army tractors is the conclusion by the plaintiff [R. 203] that they came from "somewhere in Utah, some big base in Utah." The defendant did not introduce any evidence to prove that it did or did not load these tractors on the flat car but argues, without

any proof of the fact, if it is a fact, that a consignor loads in all cases where the shipment consists of a carload or more. The defendant desires this court to assume that the Government loaded this car and that the defendant had nothing to do with said loading. It is submitted that such assumption is unwarranted. We have here a flat car belonging to the defendant, operating on a track under the control and supervision of the defendant, so the only reasonable inference is that the defendant either loaded the equipment upon this flat car or supervised and managed the loading thereof, or at least inspected it before accepting the loaded car for shipment.

Evidence was presented by the plaintiff that the army tractors were improperly secured to the flat car by worn, frayed, weather beaten and dark coated wires, which were inadequate to hold the tractors in place [R. 203], and that on previous occasions, wires holding similar equipment had been found broken [R. 156]. The defendant was negligent in permitting or accepting for trans-shipment, these army tractors to be so secured and the defendant knew or should have known that wires might break during a long trip, causing said army tractors to become loose and thereby creating an unsafe condition for its employees, whose duty it was to walk across said flat car.

The appellant admits (App. Br. p. 5) that paragraph VI of the plaintiff's complaint could conceivably be supported by the evidence on the charge that the defendant

failed to provide a reasonably safe and proper place for the plaintiff to work and as a result thereof, the plaintff was caused to and did fall from the train. This concession by the appellant is sufficient to substantiate the decison by the trial court that the allegation of the plaintiff in paragraph VI of his complaint is true [R. 3, R. 9].

> ". . . the Appellate Court will generally make all reasonable presumptions that the verdict is based on sufficient evidence and will not presume that the verdict is without evidentiary support or is opposed to the weight of the evidence."
>
> *Sallisbury v. Compe-Rose Co.,* 236 Pac. 174.

It was held in *Benson and Marxer v. Riger,* 172 N. W. 166,

> "If appellant makes a concession in his argument on appeal, the Supreme Court owes him no duty to ascertain whether or not the facts warrant the concession."

The same point of law was upheld in the California case of *Harmon v. Keough,* 41 Cal. App. 773.

There is no evidence absolving the defendant for the use of the wires in question. The defendant had complete control and management of the train and the loading of its cars. There is no evidence that the train was inspected at Yermo, California, where the plaintiff boarded the train. The exact time and place at which these wires broke is not known. The plaintiff, on this particular run, always inspected the right side of the train as it was

accepted custom for either the conductor or Mr. Hopkins, another brakeman, to inspect the left side of the train [R. 90]. This accident happened on the left side of the flat car in question [R. 25]. The plaintiff, therefore, was not afforded an opportunity prior to the accident to observe whether or not these wires were broken or how the tractor was loaded. At the time of the accident, the plaintiff was performing his work by walking on top of the freight cars and flat cars while the train was moving. It was not necessary for him to pass and inspect each part of the train at regular intervals. On the evening of the accident an emergency arose which caused him to have to move quickly along the left side of the flat car from which he was thrown. Plaintiff was proceeding to invesetigate what appeared to be a fire under the freight car ahead [R. 25].

There was a duty on the part of the defendant company to afford the plaintiff a safe place to work and to perform his duties. By securing the equipment on this flat car in the negligent manner which had been alleged, a safe place to work was not afforded to the plaintiff in that it should have been anticipated that wires, such as those used, would break and create a hazardous condition. The defendant did not exercise reasonable or ordinary care such as would be exercised by a reasonably prudent person in the loading of said army tractors on the flat car, or accepting said cars for shipment so negligently loaded. The securing of this equipment in the manner set forth constituted negligence under the circumstances.

II.

The Doctrine of Res Ipsa Loquitur Is Applicable in This Case.

In the case of *Pitcairn v. Perry* (10th Cir. (1941), 122 F. (2d) 881; Cert. Den. 314 U. S. 697, it was held that the doctrine of *res ipsa loquitur* was applicable in an action brought under the Federal Employers Liability Act, U. S. C. A. Title 45, Secs. 51-60.

> "Whenever a thing which produces an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care is exercised, the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care."
>
> *Pitcairn v. Perry, supra.*

It has been held that a complaint pleading negligence generally as well as specifically lays the foundation for the application of the *res ipsa loquitur* doctrine.

> *Hackley v. So. Pac. Co.,* 6 Cal. App. (2d) 211 (1935).

Furthermore, if the evidence or facts of the occurrence of an accident permits the inference of negligence, the *res ipsa loquitur* doctrine applies to the relationship of master and servant under the chapter upon which this action is based.

> *Seibert v. Litchfield R. R. Co.,* 159 S. W. (2d) 612.

Negligence was alleged generally and specifically in this action and there is sufficient evidence to prove that an

accident did occur [R. 25, R. 34, R, 36, R. 138, R. 125, R. 31, R. 127, R. 169, R. 60], thereby creating the inference of negligence under the doctrine of *res ipsa loquitur.*

Under this doctrine a *prima facie* case of evidence was established in that the loading and the condition of the tractors on the flat car was solely under the control of the defendant company, and the particular method in which said tractors were loaded proved to be defective, thereby causing the plaintiff to be thrown from the car. The burden of proceeding with the evidence shifted to the defendant to prove that the method used was proper or that it did not have any responsibility in the manner in which said loading was done. The record shows that the defendant did not present a scintilla of evidence on this point.

In an action against a railroad for the death of a brakeman, caused when the track under the railroad's control broke, causing the brakeman to fall from the engine, the court held that the sudden breaking or fracture of the rail over which the engine was passing, despite the fact of inspection and care, was such evidence as to require the submission of the issue of negligence to the jury under the *res ipsa loquitur* doctrine.

Seibert v. Litchfield R. R. Co., 159 S. W. (2d) 612.

The appellant contends that the full responsibility for the loading of these tractors should be placed upon the United States Government because they were army tractors, notwithstanding the complete lack of evidence by whom these tractors were loaded. The defendant rail-

road does not deny it accepted the shipment, even if we assume that the Government did do the loading. Therefore, the defendant must have approved the method of loading. Counsel for the defendant admitted that there was a duty on the defendant to make a proper inspection prior to accepting the shipment, and that liability would exist if the particular method of loading was improper or negligent [R. 222].

In an action under this chapter for injuries to a servant in an accident caused by a device or machine, where management, control, inspection, and repair of which were entrusted to other servants by the defendant employer, the *res ipsa loquitur* doctrine could be applied.

> *Bermer v. Terminal R. R. Assoc. of St. Louis,* 156 S. W. (2d) 657 (1941).

The doctrine of *res ipsa loquitur* applies in a case where the instrumentality causing the accident is within the control of the defendant.

> "In an action for injuries to an employee, the *res ipsa loquitur* doctrine applies only where control of the instrumentality exists in an employer or servants of an employer, other than the injured person, since the doctrine rests on the principles that those in control have been negligent."
>
> *Dryden v. The Western Pac. R. R. Co.*, 1 Cal. App. (2d) 49.

It is true that the plaintiff, suing under sections 51 to 60 of Title 45 of the U. S. C. A. has the burden of proving that the injury was attributable to the carrier's

neglect. However, the *res ipsa loquitur* doctrine prescribes, as a substitute for specific proof, a method by which the plaintiff can prove such negligence.

Noce v. St. Louis-San Francisco, 85 S. W. (2d) 637.

The trial court, in finding for the plaintiff, cited *Pitcairn v. Perry* (10th Cir., 1941), 122 F. (2d) 881; Cert. den. 314 U. S. 697, in which the doctrine of *res ipsa loquitur* was applied. The appellant argues that said case is not in point with the one at bar in that the *Perry* case presented a strong inference that the defendant was negligent in failing to keep the door of a box car in proper repair, and further, that the defect in that case was not readily apparent to the employee. In the case at bar, the employer had superior or exclusive means of knowing in what manner the army tractors were secured to the flat car, and that any defect that might exist in the wires was not readily apparent to the plaintiff. In the *Perry* case the box car door became worn and corroded and was so rotten and defective that when the plaintiff and others attempted to move said door, it left its fastenings and fell on the plaintiff, injuring him. In the case at bar, the wires holding the army tractors to the flat car were worn and corroded and were not sufficiently strong enough to hold the army tractor in place, and because of that condition, said wires broke, causing the plaintiff to become entangled in them, and that circumstance, plus a sudden moving of the loose tractor on the flat car [R. 25], caused him to be thrown from the train. The duty and the responsibility of seeing that the wires were sufficiently strong to hold the army tractor was not the plaintiff's. He had no control over the particular

instrumentality nor did he have any means of knowing the dangerous condition that existed. At the time of the accident he was performing his duties and was in the process of finding out what was causing the fire on the car ahead [R. 25]. The plaintiff had no control of the train other than what would be normally considered to be his duties. If these wires broke between the period of time that elapsed from the point of last inspection to the point of the accident, then the plaintiff would have been unable to ascertain whether or not this condition existed and, therefore, the set of facts that existed in the *Perry* case are in point with the set of facts in the case at bar. It was further held in the *Perry* case

> "in an action against an employer for injuries to an employee because of a defect in an instrumentality under the employer's control, the employer's superiority or exclusive means of knowledge thereof is basis for the adoption of the *res ipsa loquitur* rule, requiring the employer to explain the occurrence."

If proper care had been used in the securing of these army tractors these wires would not have broken. The defendant railroad knew or should have known that this manner of securing heavy equipment was inadequate, in view of the fact that such wires had broken on previous occasions [R. 156]. The fact that the wires did break indicates negligence.

The court held in *McAuliffe v. N. Y. C. & H. R. R. Co.*, 150 N. Y. S. 512, that

> "the doctrine of *res ipsa loquitur* applies where the accident complained of was such that it would not have occurred if proper care had been used."

The appellant insists that there was a lack of evidence on the part of the plaintiff establishing what caused the accident.

In *Ramsouer v. Midland Valley R. R. Co.,* 44 F. Sup. 523, it was held:

> "The plaintiff was not deprived of the benefit of the *res ipsa loquitur* doctrine because of the introduction of evidence which does not clearly establish the facts or leave the case of accident in doubt."

The appellant maintains that the carrier was obligated to accept the tractors for transportation as prepared by the shipper, but admits that if there was evident negligence in such preparation that the carrier need not accept the shipment [R. 222]. This certainly indicates that the defendant railroad did have control and supervision over the manner in which these tractors were loaded and that the defendant was negligent in permitting such heavy equipment to be secured to a flat car with wires that could not, and did not, serve the purpose for which they were used.

In this case the facts definitely warrant an inference of negligence on the part of the defendant railroad and, therefore, the doctrine of *res ipsa loqutur* is applicable, as the trial court correctly found [R. 8]. The plaintiff suffered injuries as a result of an accident caused by an instrumentality which was solely under the inspection and control of the defendant railroad and other servants of said defendant. When this equipment was originally placed on the flat car, the loading, securing and final approval of said loading was made by the defendant. The plaintiff had nothing to do with this inspection. He could rightly assume that such equipment would be prop-

erly secured so that it could stand the rigors of a long trip over mountainous territory. The burden of proceeding with proof properly shifted to the defendant to explain why this tractor was so secured to the flat car and to submit sufficient evidence to overcome the presumption of negligence placed upon it under the doctrine of *res ipsa loquitur*. The accident would not have occurred if proper care had been used by the defendant.

In *St Louis-San Francisco R. R. Co. v. Bishop,* 33 S. W. (2d) 383, a set of facts similar to the case at bar, a brakeman, whose duties were the same as that of the plaintiff, fell off of the train when a grab iron on the side of the car broke as he attempted to take hold of it. The court stated:

> "Where a careful, vigorous brakeman went safely over freight cars until reaching a defective grab iron and fell on that side of the car where blood was found on the wheel, it was sufficient to justify the conclusion that the defective grab iron caused the fall."

It cannot be maintained that there was a duty upon the brakeman in the case just cited to discover that the grab iron was defective, and it certainly cannot be maintained in the case at bar that there was a duty upon the plaintiff to discover that the wires were broken while he was attempting to investigate a fire on a freight car ahead. The appellant places the plaintiff in a position where it was his duty to afford himself a safe place to work and that he should have rectified the condition by proper inspection.

The appellant cites the case of *McGivern v. M. P. Ry. Co,* 132 F. (2d) 213. The facts are not in point with that of the case at bar. In that case the plaintiff was

fully aware of the conditions existing at his place of employment. He saw that the snow was falling and knew that ice and snow had accumulated on the footboard, and he could have rectified that condition by using the tools made available to him for that purpose. In the case at bar, there was no notice given to the plaintiff that the wires had broken and he did not know of the unsafe condition that existed at the time that he had to move quickly to the scene of the fire that appeared on one of the cars ahead of him [R. 25]. The plaintiff had no knowledge or no opportunity to rectify the particular defect that existed and which caused him to be thrown from the train.

The appellant also cites *Duffy v. Hobbs, Wall & Co.,* 166 Cal. 210, as being in point. It is submitted that the facts in this case are such that it cannot be used as authority, contradicting the point of law presented by the plaintiff. In this case a decayed post, holding a railing, gave way, precipitating the employee into the water. It was held that it was a duty of that employee to remedy that particular defect and to keep the premises safe. He had not only the duty to look for defects but had the opportunity to observe what defects existed. In the case at bar, the plaintiff had no such opportunity presented to him to observe the particular defect that existed. At the time of the accident an emergency had arisen and he was acting in accordance with that emergency. The circumstances in both cases are not the same.

The following cases and portions of the decisions therein are further cited in support of the theory that the doctrine of *res ipsa loqutur* is applicable in this case:

> "In an action brought under the Federal Employers Liability Act the plaintiff did not assume the risk of his employment under the circumstances so as to preclude him from recovering damages for injuries sustained from slipping upon grease deposited and left on the running board by the negligence of a fellow employee unless he knew or by the exercise of reasonable care should have known, that it was there. In the absence of proof by the defendant railroad company of a habit of workmen to leave grease on running boards, a fellow servant may not be presumed to anticipate that dangerous practice, and in said action where a plaintiff established a *prima facie* case of negligence on the part of some co-employee in leaving a lump of grease on the running board, it was not necessary for him to prove just who dropped that grease on the board."
>
> *Crabtree v. The Western Pac. R. R. Co.,* 33 Cal. App. (2d) 35.

In the case at bar it was not necessary for the plaintiff to prove who did the actual securing of the army tractors to the flat car. The burden cannot be imposed on the plaintiff employee to anticipate that the wires would break and create an unsafe place for him to work. The appellant urges that there was no evidence that the wires were unsuitable and that there was no evidence of negligence of any sort as to what caused the breaking of the wires. The fact that the wires did break and that they were insufficient to properly secure the army tractors is adequate evidence that the wires were unsuitable and that there was negligence on the part of the defendant.

In *Cason v. Kansas City Term. R. R. Co.,* 123 S. W. (2d) 133, it was held:

> "In a switchman's action against a railroad for injuries allegedly caused by a defective hand brake on a freight car on which the switchman was riding, the switchman was not required to rely on proof of a specific defect in the brake equipment nor to prove negligence of the railroad."

The court has many times held contrary to the appellant's contention that the plaintiff had to look out for himself and to remedy any defects that might exist in order to afford himself a safe place to work.

> "In an action to recover for wrongful death of a switchman who slipped from the foot board of an engine on which there were particles of coal, evidence was sufficient to show defendant's neglect and that the death was caused thereby."
>
> *Castle v. Union Pacific R. R. Co.,* 166 N. W. 767.

> "In an action for injuries to a fireman by slipping on an oil tank of a locomotive, a finding that it was not 'usual and customary' for oil and grease to be on such engines was sustained by the evidence and was sufficient to sustain a finding of negligence on the part of the defendant."
>
> *Gulf, C. & S. F. R. R. Co. v. Crow,* 220 S. W. 237.

In the case at bar, it was not "usual and customary" for broken wires to exist on these flat cars and a finding of negligence on the part of the railroad was supported by the evidence.

The plaintiff, in performing his duties on and about the railroad cars, has the right to assume that said cars

were loaded properly and that the manner in which they were loaded afforded him a safe place of employment.

Morey v. Main Central R. R. Co., 133 Atl. 92.

> "The slippery condition of a car or platform is not to be assumed by a brakeman."
>
> *York v. Chicago R. R. Co.,* 198 N. W. 377.
>
> "A brakeman did not assume the risk of injury from a fellow employee's negligence, inspection, or manner in which a load on a freight car was secured."
>
> *Mich. Central R. R. Co. v. Schaffer,* 136 C. C. A. 413.

In applying the test as to what constituted proper loading the court held in *Lane Bros. Co. v. Couch,* 112 C. C. A. 659:

> "Where a fireman employed on a locomotive used in construction work to push freight cars loaded with bridge timbers had been killed by the insufficiency of one of the standards on such a car, which allowed a timber to fall therefrom, it was held that an instruction that the defendant was not liable if the ties were loaded and handled in the way usual and ordinary on such a construction track was properly reviewed; 'for' said the court, 'it overlooked the contingency that a method may be ordinary and still be dangerous or reckless. The criterion is not merely the custom, but the custom of ordinary prudent operators."

Appellant's contention that the method of loading the army tractors was the usual method is unsupported by the evidence and is untenable. Appellant sets forth on page 13 of its brief, that there is uncontradicted evidence in the record that the defendant exercised due care in accepting the shipment and in caring for it enroute. There

is no evidence whatsoever in the record to substantiate this contention.

The defendant railroad company should have known, by exercising reasonable care such as would be exercised by a prudent person, that securing such heavy equipment to a flat car with wires created a dangerous condition, taking into consideration that said flat car and tractors were destined to travel a long distance over mountainous territory. This accident would not have happened had the defendant company not used worn and defective wires. The securing of these tractors was solely within the control of the defendant and there was no burden upon the plaintiff to prove how or in what manner the wires broke. The doctrine of *res ipsa loqutur* is applicable in this case. An accident did happen, the wires did break, and said loose wires, plus the movement of the tractor, did cause the plaintiff to be thrown from the flat car, therefore, establishing a *prima facie* case of negligence. The defendant did not overcome the burden of going forward with the evidence to rebut this presumption of negligence. No evidence was submitted by the defendant to show that it properly secured these tractors on the flat car, or that it properly supervised said loading, or made an inspection before accepting this shipment, or to show that it used reasonable care in affording a safe place of employment for the plaintiff. If it is to be believed as argued by counsel for the defendant, that actual or constructive knowledge must be shown in order to find the defendant guilty of negligence, the intent of the Federal Employers Liability Act will be circumvented and the protection that a railroad employee should have would be lost. The Federal Employers Liability Act was primarily created to protect the employee in cases such as the one before the court [R. 217].

III.

There Was Evidence That the Negligence of the Defendant Was the Proximate Cause of the Accident.

The defendant is liable in that it did not exercise ordinary reasonable care in affording the plaintiff a safe place to work. Under the Federal Employers Liability Act there is created a definite duty and care toward an employee of a railroad by the employer and foremost is the duty of the railroad to furnish the employee with a safe place to work. The contention by the appellant that this duty was placed upon the plaintiff in the case at bar is not substantiated by the facts nor by the law, moreover, there is a common law duty of an employer to furnish his employee with a safe place to work and to use reasonable care in so doing. The defendant furnished the plaintiff a loaded flat car upon which he was to perform his work. The manner in which this flat car was loaded was solely within the knowledge and control of the defendant. The defendant's attempt, in its opening brief, to excuse itself from the negligent loading of these army tractors is not substantiated by any evidence in the record.

On page 5, paragraph 3 of the appellant's opening brief, the appellant admits "the second portion of paragraph VI is the only allegation in the complaint which makes a charge which could conceivably be supported by any evidence in the case." This is the charge that the defendant failed to provide a reasonably safe and proper place for the plaintiff to work, which was the proximate cause of the

plaintiff's falling from the train. The appellant, therefore, admits that there is evidence in the case to support the allegation of negligence.

> "If there is nothing before it which shows that the verdict was in fact without evidentiary support or against the weight of the evidence, the appellate court will make all reasonable presumptions in favor of the sufficiency of the evidence to support the verdict and view the evidence in the light most favorable to the verdict giving it the benefit of all reasonable inferences therefrom."
>
> *Corpus Juris Secundum,* Vol. 5, p. 1562, subd. D.

> "The party attacking a verdict on the ground that it is without evidentiary support or contrary to the weight of evidence has the burden of establishing his contentions, for, the appellate court will generally make all reasonable presumptions that the verdict is based on sufficient evidence and will not presume that the verdict is without evidentiary support or is opposed to the weight of evidence."
>
> *Sallisbury v. Compe-Rose Co.,* 236 Pac. 174;
>
> *Lerner Shops of Ala. v. Riddle,* 164 So. 385;
>
> *Campbell v. Bradbury,* 176 Pac. 685.

The appellant asserts that there was no evidence that it had anything to do with the use of the wires in question and that the only inference was that Government employees had used them. This is a violent assumption on the part of the appellant in his argument in that there is no evidence in the record that Government employees had anything to do with the loading of these army tractors on the flat car, and it is untenable in that this was the defendant's train and under the exclusive control and

supervision of the defendant at the time that the plaintiff went to work at Yermo, California. If there is any inference to be drawn as to who loaded this particular flat car it can only be that it was done by the defendant and under the control and supervision of the defendant. Even if we were to guess that the tractor was loaded by some Government employee, the defendant still had the right and duty of inspecting it to determine if it had been properly loaded and secured, for the duty still would devolve upon the defendant of furnishing a safe place for the plaintiff to work.

> "Although it is sometimes said that the appellate court must accept undisputed evidence as true, if there is a conflict in the evidence the appellate court will presume that the jury resolved the conflict in favor of the party for whom the verdict was rendered, and, unless it is opposed to the physical facts or inherently incredible, it will assume the truth of such party's evidence, which will be viewed in the light most favorable to the verdict and given the benefit of all inferences that may reasonably and legitimately be drawn therefrom."
>
> *Bellon v. Silver Gate Theatre,* 47 P. (2d) 462;
>
> *Truidner v. Knight,* 257 Pac. 451;
>
> *Lindemann v. San Joaquin Cotton Oil Co.,* 55 P. (2d) 870.

As stated above, the appellant concedes that there was evidence to substantiate the plaintiff's allegation of negligence, but attempts to overcome this by unsupported and inaccurate inferences.

It was held:

> "If appellant makes a concession in his argument on appeal, the Supreme Court owes him no duty to ascertain whether or not the facts warrant the concession."
>
> *Benson & Marxer v. Riger*, 172 N. W. 166.

The defendant is liable under the theory of *res ipsa loquitur* in that the plaintiff established a *prima facie* case of negligence [R. 8]. The trial court based its decision on the case of *Pitcairn v. Perry* (10th Cir., 1941), 122 F. (2d) 881; Cert. Den., 314 U. S. 697. This was discussed in detail in the preceding section. The *prima facie* case was established in that the loading and the condition of the tractors on the flat car was solely under the control of the defendant company. The defendant employer had full management, control, inspection and repair of the particular device or machine that was concerned in this accident and under these circumstances, the *res ipsa loquitur* doctrine was applicable. The application of the doctrine of *res ipsa loquitur* raises an inference of negligence which must be overcome by the defendant.

Anderson v. Jameson Corp., 59 P. (2d) 962.

The defendant did not introduce any evidence whatsoever to overcome the *prima facie* case of negligence that had been established by the plaintiff. The evidence presented by the plaintiff, together with the admission by the defendant that it was the owner of the particular equipment involved, created a reasonable inference that the defendant had loaded and had complete supervision over the instrumentality involved.

In *Baumann v. Harrison,* 115 P. (2d) 530 (1941), the court held that the decision of a trial court may be rested upon reasonable inferences as well as upon direct evidence.

The defendant, having failed to show a lack of negligence on its part, and that the injury was not due to its want of care, thereby permitted the plaintiff to prevail on the ground that the negligence of the defendant was the proximate cause of the accident.

IV.

There Was Evidence of Proximate Cause Between the Accident and the Injury.

The evidence was clear that the plaintiff sustained an injury to his abdomen at the time of the accident [R. 25, R. 26, R. 27, R. 28, R. 30, R. 31, R. 33, R. 125, R. 130, R. 131, R. 132, R. 133, R. 139, R. 141, R. 143]. The record is replete with testimony that the plaintiff suffered an injury at the time that he was thrown from the flat car and said evidence is not "unconvincing testimony" as the defendant states on page 19 of its opening brief.

The plaintiff kept a small book in the regular course of his employment in which he made daily notations. This book was admitted in evidence as Plaintiff's Exhibit No. 3 [R. 45]. In that record book [R. 169], there is a notation after the date of January 22nd (which was the day following the accident) which says, "reported to doctor, Yermo." This corroborates the testimony of the plaintiff and the other witnesses to the effect that the plaintiff suffered an immediate injury and this is unimpeachable evidence that the plaintiff did see a doctor, Dr. Ballachey, shortly after the accident [R. 33]. Dr. Ballachey did not

"categorically deny" that no hernia was present before February 16, 1944, as the appellant asserts on page 19 of its opening brief, but admitted that it was possible that he may have examined the plaintiff on the return trip after the accident [R. 108] (January 22, 1944).

The plaintiff produced evidence that an immediate report of the accident was made by letter, Plaintiff's Exhibit No. 5 [R. 170, R. 171]. The defendant acknowledged the receipt of this report in a letter dated February 13, 1946, Plaintiff's Exhibit No. 4 [R. 60]. All of this presented a preponderance of evidence on behalf of the plaintiff, that he did suffer an immediate injury contrary to the appellant's assertion that evidence as to the time and nature of the injury is vague.

The defendant seeks to overcome the effect of this evidence by the introduction of accident reports signed by the plaintiff and by other employees to the effect that the plaintiff did not suffer an injury at the time of the accident. The plaintiff explained the inconsistency between the report dated March 4, 1944, and his testimony in court [R. 73, R. 74]. He stated that at the time of that report the swelling on his abdomen was getting worse and that at the time of the accident he did not think that he was seriously injured. The plaintiff's testimony was the same in explaining the accident report dated April 22, 1944 [R. 76]. The plaintiff testified in further explanation of these signed statements that he was afraid to tell the defendant's claim agents how badly he was hurt because he thought that they would pull him out of service and he would be unable to feed his wife and seven children [R. 99]. These statements were typed by the defendant's agents and were worded in the particular way

in which they saw fit [R. 99]. He was told to sign these reports, which he did, and was told that there was nothing for him to worry about [R. 63, R. 100].

The defendant refers to a signed statement by Kenneth Anderson, the rear brakeman, in an attempt to show that the plaintiff did not suffer an injury at the time of the fall (App. Op. Br. pp. 20 and 21). Kenneth Anderson does not deny signing this statement. He testified in court that the plaintiff did suffer an injury at the time of the fall and that the plaintiff complained that his "stomach was sore" [R. 143].

Robert Hopkins explained the signed statement introduced by the defendant by stating that this report was made out some time after the accident but that he associates the plaintiff's report to him of having a pain in his abdomen with the accident.

The plaintiff and the other witnesses who work for the railroad company are hard working railroad men and their explanation of what they meant by the word "injury" is quite different than what was meant by that word in the accident reports drawn up by the defendant's agents. There is a presumption that they were speaking the truth when on the witness stand in court. The trial judge listened to their testimony and observed their demeanor in court. The trial judge believed the testimony of the plaintiff and the other witnesses to the effect that the plaintiff was injured at the time of the fall [R. 214, R. 215, R. 216]. The trial judge further stated that there was a preponderance of evidence in favor of the injury having been sustained as of the time of the fall [R. 227].

> "The appellate court will not disturb the findings if it cannot say that a reasonable man could not have

reasonably reached the conclusions reached by the trial court."

Taylor v. Bunnell, 23 P. (2d) 1062.

"This court has held that when the evidence on material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court observed the witnesses, their manner of testifying, and must have accepted one version of the facts rather than the opposite."

Cary v. Reiter, 240 N. W. 582.

"An appellate court does not, of course, see the witnesses or hear their testimony. We have before us nothing but the cold record, whereas the trial judge is in a position to observe the witnesses while they are on the witness stand giving their testimony. He has before him the parties directly involved and can observe their demeanor and the demeanor of the witnesses during the trial and is, therefore, in a far better position than is possible for an appellate court to be to weigh the evidence and to determine where the truth lies. It is because of this advantageous position of the trial judge that appellate courts, in reaching their conclusions in close cases where the evidence is conflicting, defer somewhat to the judgment of the trial judge, even though they are not bound by such judgment."

Colaks v. Colaks, 75 S. W. (2d) 600, 603.

"Where the appellate court finds that it is wholly unable to determine where the preponderance of the evidence lies, it treats the findings of the trial court as pursuasive and adopts such findings as its own."

Maloy v. Maloy, 271 S. W. 13.

It is submitted that the evidence was sufficient to justify a decision by the trial court that there was a proximate causal connection between the accident and the injury. In addition to the abdominal injury, the plaintiff sustained a broken tooth, a cut lip, and a cut knee [R. 27, R. 125]. The defendant did not contend that the plaintiff did not suffer these other injuries.

V.

Damages.

The evidence produced on the part of the plaintiff showed that as a result of the negligence on the part of the defendant and the fall occasioned thereby, the plaintiff lost one hundred and seventy-seven (177) days' work [R. 8, R. 53]. The plaintiff testified that he was paid a wage of eight dollars and 24/100 ($8.24) for each one hundred miles and that he averaged one hundred and sixty-four (164) miles per day [R. 8, R. 54]. On the basis of one hundred seventy-seven (177) days lost the plaintiiff sustained damages in the sum of two thousand three hundred and eighty-three dollars and 66/100 ($2,383.66) in loss of earnings [R. 8].

The trial court fixed the sum of five hundred dollars ($500.00) as a nominal award for pain and suffering [R. 8].

The total sum of damages sustained by the plaintiff as a result of this accident was found to amount to two thousand, eight hundred, eighty-three dollars and 66/100 ($2,883.66).

VI.

The Decision of the Trial Court Should be Affirmed Where There Is Evidence to Support the Findings.

The trial court, in its findings of fact and conclusions of law, found that the allegations contained in paragraphs I, II, III, IV, V and VI of plaintiff's complaint were true. The trial court found that as a direct and proximate result of the defendant's negligence and carelessness, as alleged in said paragraphs V and VI of the plaintiff's complaint, plaintiff sustained injuries to his person and that the muscles, tissues, walls and membrane in plaintiff's abdomen were severely torn, lacerated and ruptured, and that he became sore and lame and suffered pain, all to his damage in the sum of five hundred dollars ($500.00). The trial court further found as true that as a direct and proximate result of the defendant's negligence and failure to provide a safe and proper place for the plaintiff to work and by reason of his said injuries, plaintiff was prevented from following his usual vocation as a brakeman for a period of one hundred and seventy-seven (177) days to his damage in the sum of two thousand, three hundred and eighty-three dollars and 66/100 ($2,383.66) [R. 9, R. 10].

The trial court further held in its findings that the allegations contained in paragraph VI of the defendant's answer were not true [R. 10].

> "The appellate court will review or examine the record to determine whether the evidence supports the findings or there is evidence which conclusively

establishes the facts other than as found as a matter of law; but, if the findings are supported by the evidence or it cannot be said as a matter of law that the facts are other than as found, the judgment of the lower court will not be disturbed."

Corpus Juris Secundum, Vol. 5, p. 699, par. 1656.

"When considering whether the findings have proper evidentiary support, the appellate court will eliminate from consideration all incompetent and immaterial evidence and consider only the evidence most favorable to the successful party, including all reasonable inferences which might have been drawn therefrom, which will be construed most strongly in favor of the judgment."

Corpus Juris Secundum, Vol. 5, p. 700, par. 1656.

"Findings of the trial court, supported by circumstantial evidence, will not be reviewed on appeal."

Byers Bros. & Co. Live Stock Commission Corp. v. McKenzie, 239 Pac. 525.

"To justify a reversal, the failure or insufficiency of the proof must relate to a vital point in the case and amount to a complete absence of substantial supporting evidence, or the evidence must be so slight as to show an abuse of discretion. If findings, which will uphold the judgment are adequately sustained by the evidence, there will be no reversal because of the insufficiency of the evidence as to other or immaterial findings . . . If there is evidence which supports the findings, they will not be disturbed for

lack of support simply because there is other evidence which, if believed and accepted, warrants findings the other way.

"That the supporting evidence is somewhat weak and unsatisfactory, or vague and uncertain, or consists of competent opinions and conclusions of witnesses, will not cause the appellate court to review to sustain the findings; and the testimony of only one witness may be sufficient to support the findings.

"Credibility of witnesses, as previously noted in subsection B is a thing which the appellate court will not ordinarily concern itself, and seldom will the findings be disturbed for interest or lack of credibility of the witnesses if, when assuming their testimony to be the truth, it adeqately supports the findings."

Corpus Juris Secundum, Vol. 5, pp. 720, 721, par. 1656.

"Fact findings of the trial court, based on substantially conflicting oral evidence, and not unwarranted as a matter of law, are accorded particularly great weight and are almost universally regarded as binding on the appellate court."

Corpus Juris Secundum, Vol. 5, p. 722, par. 1657 (a).

It is submitted that there is sufficient evidence in the record to sustain the findings of fact and conclusions of law as found in this case by the trial court [R. 9, R. 10].

Conclusion.

The trial court found, from the evidence and the law applicable thereto, that the defendant was negligent in failing to provide the plaintiff with a safe place of employment, and that the plaintiff had established a case of negligence as against the defendant under the doctrine of *res ipsa loquitur*. As a result of this negligence on the part of the defendant, the plaintiff sustained injuries to his person which caused him pain and suffering, and prevented him from working for a period of one hundred and seventy-seven days.

Judgment of the trial court in favor of the plaintiff should be affirmed.

Respectfully submitted,

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